

NO. 22671

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ROBERT E. McDONOUGH, et al.,  
Appellants,

-vs-

SNELLING & SNELLING, INC.,  
Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

APPELLANTS' REPLY BRIEF

---

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15,17,18,19

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15,17,18,20





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4

5 Respondent's brief has been prepared with zeal  
6 and skill. In its application of these two admirable  
7 qualities, however, Snelling has frequently sacrificed the  
8 factual accuracy and precise legal exposition which are  
9 the touchstones of fair appellate advocacy. Appellants  
0 will endeavor here to expose and explore representative  
1 examples of these sacrifices.

2 I FACTUAL DISTORTIONS IN RESPONDENT'S BRIEF

3 A. Scope of Hearing and Scope of Appeal  
4 Trade Secrets

5 Snelling states (Resp. Br. 10) that the  
6 hearing "was broadened to include the question of whether  
7  
8



1 Snelling possesses protectable trade secrets when  
2 Appellant sought to establish that no such trade secrets  
3 exist." A review of the record herein reveals that the  
4 McDonoughs (hereinafter referred to in the singular)  
5 made at least two forceful attempts to keep the trade  
6 secret question out of the hearing (II R. 9:9-11:18;  
7 23:7-27:1, with particular emphasis on 26:12-27:1).<sup>1</sup>

8 Snelling produced the manuals in the courtroom and caused  
9 them to be received as evidence in the case. In addition,  
0 in its Memorandum of Points and Authorities in Support  
1 of the Temporary Restraining Order and Order to Show  
2 Cause Re Preliminary Injunction, Snelling introduced the  
3 "trade secret" issue into the case (I R, 35:17-36:20;  
4 38:28-39:12;66:2-67:14). Clearly, from the beginning,  
5 Snelling relied on a "trade secret" argument in seeking  
6 the preliminary injunction - the issue appears in the  
7 first papers it filed.

8 In defending against the application  
9 for preliminary injunction, when the contention of "trade  
0 secrets" had been raised in Snelling's moving papers,<sup>as the source</sup>/  
1 and the training manuals (identified in the moving papers  
2 of the "trade secrets") had been received in evidence,  
3 McDonough had no choice but to endeavor to rebut this  
4 contention in every possible way. But the suggestion by

5 \* 1

6 Appellants have adopted Respondent's system of  
record references to reduce confusion.



1 Snelling that it was McDonough who broadened the hearing  
2 to pick up the trade secret issue, constitutes a gross  
3 misrepresentation of the record in this case.

4 As a further examination of Snelling's  
5 moving papers discloses, the preliminary injunction was  
6 sought on three bases: 1) trade secrets, 2) trade name,  
7 and 3) restrictive covenant. McDonough did not see, at  
8 the time the hearing commenced, at any time during the  
9 hearing, nor in the proceedings before this Honorable  
0 Appellate Court, how the trade secret and trade name  
1 issues have had any pertinency whatsoever. Neither the  
2 injunction sought nor the injunction granted directed  
3 McDonough to discontinue his use of the alleged trade  
4 secrets and trade name in San Bernardino County - it simply  
5 prevented him from "opening an employment agency office  
6 in the City of San Bernardino" ( I R 44:2-13; 95). Since  
7 McDonough was free, whether the injunction were granted  
8 or not, to utilize the alleged trade secrets and utilize  
9 the "S & S" name, and use them in San Bernardino County  
0 (albeit from his Riverside Office if the injunction were  
1 granted) it is impossible to see how the injunction could  
2 be predicated upon such foundations. The only relief  
3 sought by Snelling was to stop McDonough from opening and  
4 operating his office in San Bernardino - the only  
5 conceivable legal basis for the court's doing so would  
6 be the restrictive covenant in the license and franchise





1 agreement entered into between the parties.

2 Nevertheless, the trial court, in Finding of  
3 Fact 14 (I R 126), Finding of Fact 27 (I R 130), Conclusion  
4 of Law 3(a) (I R 133-134), set forth its reliance upon  
5 the "trade secret" foundation for its order granting the  
6 preliminary injunction. Appellant submits this was an  
7 irrelevant and immaterial concept, as hereinabove explained,  
8 since McDonough remains free today to utilize in San  
9 Bernardino any and all of the claimed trade secrets of  
0 Snelling, providing only he does it from his Riverside  
1 office.

#### 2 Irreparable Injury

3 Snelling asserts (Resp. Br. 10) that at  
4 the last two hearings before the trial court "the parties  
5 broadened its scope to include a reexamination of the  
6 trade secret question and the propriety of any order  
7 enjoining Appellants from operating a personnel agency  
8 in San Bernardino." This is certainly not true. Snelling  
9 repeatedly and successfully objected to lines of questioning  
0 of its witness McBrearty which were being pursued by  
1 McDonough (II R. 235:13-236:11; 236:24-237:6; 238:8-19;  
2 240:17-241:23; 243:7-17; 249:5-250:12; 278:23-279:7) upon  
3 the basis that these hearings involved only the motions  
4 for supersedeas and to suspend injunction pending appeal.  
5 If, as Snelling suggests, the last two hearings consti-  
6 tuted a reexamination of the trade secret and irreparable





1 injury questions, McDonough was severely limited and  
2 restricted in his efforts to introduce relevant testimony  
3 pertinent to those issues. Additionally, of course, the  
4 offered testimony bore on McDonough's Motion for  
5 Supersedeas as tending to show that the Riverside franchisee  
6 was not the serious threat to Snelling, and that the  
7 national franchisor had so many other problems with its  
8 franchisees that the damage forecast by McBrearty would  
9 have been produced by other causes and that, therefore,  
10 the supersedeas should have been granted, permitting  
11 McDonough to maintain the San Bernardino office.  
12 Additionally, the lines of questioning being pursued by  
13 McDonough were relevant and material on his motions to  
14 amend and supplement findings of fact and conclusions of  
15 law (I R. 104-116) and his motion to suspend injunction  
16 pending appeal (I R 102-103), both of which were being  
17 heard at the same time (II R 129:4-13; 286:17-24).

18 No doubt, Snelling would prefer that  
19 these hearings of October 31, 1968, and November 17, 1968,  
20 be construed by this appellate court as being pertinent  
21 to the order granting the preliminary injunction, even  
22 though said order was filed October 5, 1967 (I R 95-96),  
23 inasmuch as, prior to said hearings, there was absolutely  
24 no evidence in the record concerning any prospective  
25 injury to its interests, from the opening of the San  
26 Bernardino office by McDonough, or otherwise.



1 Surely, considerable effort has been  
2 expended in the District Court and in the parties'  
3 appellate briefs, on the "trade secrets" question.  
4 Appellant maintains, nevertheless, as he maintained in  
5 the District Court, that this appeal can and should be  
6 decided on the illegality of the restrictive covenant  
7 alone. Among other benefits, such a disposition leaves  
8 for the trial on the merits the trade secret issue, a  
9 development evidently warmly desired by Respondent  
10 (Resp. Br. 62).

11 B. Other Factual Misstatements

12 1. Snelling represents (Resp. Br. 2) that  
13 its techniques "enable counselors to place all qualified  
14 applicants instead of filling only existing 'job orders'".  
15 This statement is directly contrary to the testimony of  
16 Snelling's number one California franchisee who testified  
17 "we work on the basis of whoever comes into our office  
18 is placeable somewhere." (II R 96:13-14) and that he  
19 recognized that his practices did not conform to the  
20 Snelling policy and manual in that regard (II R 121:12-122:  
21 11).

22 2. Snelling would have this Court believe  
23 (Resp. Br. 3) that it uses the detailed monthly reports  
24 from its franchisees to "solve problems in the reporting  
25 office and problems which are common throughout the  
26 system." Snelling's manual may so state but the record



1 is devoid of evidence showing that the detailed monthly  
2 reports from the franchisees were actually used for any  
3 purpose.

4 3. Snelling states (Resp. Br. 3) that  
5 "there is no evidence to indicate that (its name) lacks  
6 substantial value" in California. There was positive  
7 and uncontradicted direct evidence from McDonough (II R  
8 35:2-37:1) that the name was of no use to him when he  
9 opened the Riverside - San Bernardino market, that he  
10 could not use it, and for that reason promoted his own  
11 S & S name.

12 4. Snelling has implied (Resp. Br. 3) that  
13 out of 500 separate businessmen who have held franchises,  
14 only 75 or so have left the system because they were  
15 unsuccessful. A more accurate analysis of the record  
16 shows that at the time of hearing Snelling had about 275  
17 remaining franchisees (II R 255:16-23), about half of  
18 the total franchisees who bought into the system had  
19 left it (II R 255:24-256:6), about 70 to 75 of the former  
20 franchisees had lost all or substantially all of their  
21 investment in the franchise (II R 230:1-19), and that  
22 the bulk of the sales and transfers of such franchises  
23 occurred because the franchisees were unable to make  
24 anywhere near the Snelling projected incomes (II R 233:2-21)

25 5. Snelling gratuitously asserts (Resp.  
26 Br. 4) that McDonough is "prominent among the rebels"





1 against the national franchisor. No record reference is  
2 submitted to support this claim and, in fact, Snelling's  
3 officer admitted that he had no reason to believe that  
4 McDonough was circulating among any of its franchisees  
5 the fact that he is or has withdrawn from the system and  
6 rescinded his license agreement. (II R 180:16-21). Ob-  
7 viously, whatever prominence McDonough has achieved has  
8 come about through his defense of his means of livelihood  
9 against the demands and the litigation commenced by  
10 Snelling, and his refusal to knuckle under to the fraud,  
11 deceit, and misrepresentation, the unfair and illegal  
12 contracts and demands emanating from Philadelphia. He  
13 was a passive member of the national franchise system,  
14 delinquent only in the payment of his contractual over-  
15 rides because of numerous prior breaches of the franchise  
16 agreement by Snelling, when he was thrust upon the stage  
17 of the federal courtroom at Snelling's behest. Prominence,  
18 like beauty, probably exists in the eye of the beholder -  
19 but to justify the assertion of its existence in an  
20 appellate brief some substance should support the statement.  
21 It appears, rather, that this is one of the many unfounded  
22 efforts of Snelling to cast an unfavorable aura about  
23 McDonough which his acts and conduct do not warrant.

24 6. Snelling accuses McDonough of seeking to  
25 reap the benefit of the Snelling association even while  
26 he was refusing to pay his 7 percent overrides (Resp. Br. 5)





1 Nothing, according to the record, could be farther from  
2 the truth. McDonough's straightforward and uncontradicted  
3 testimony was that he attempted to promote the use of and  
4 capitalize upon the Snelling name until January of 1966  
5 (the first month in which he discontinued paying over-  
6 rides) and then ceased the practice because of his inability  
7 to advertise in the Snelling name, the inability of his  
8 employer contacts to find his office through the medium  
9 of the telephone listings, and the resulting confusion  
10 and loss of business which ensued (II R 35:7-37:1)

11 7. Again (Resp. Br. 9 and 10) Snelling  
12 charges McDonough with attempting to negotiate a modified  
13 contract or other settlement of the dispute with Snelling,  
14 without mentioning his San Bernardino plans. While the  
15 bare fact is admittedly true, the opprobrium Snelling  
16 seeks to attach to it is undeserved. In the first place,  
17 there is no evidence whatever that McDonough had any  
18 plans regarding San Bernardino until after his receipt of  
19 Snelling's notice of intention to terminate of May 10,  
20 1967 (I R 26). This letter informed McDonough that he  
21 would be subjected to all of the default provisions of  
22 the license and franchise agreement, which included  
23 requirements that he turn over all of his business  
24 records and books of account, his telephone number and  
25 his office space. Clearly, the receipt of this notice  
26 necessitated some soul searching on McDonough's part.



1 His response, the notice of rescission (I R 56-58) if  
2 justified and effective, would have severed all future  
3 obligations between them. Thus, at this point, there  
4 would be no point in McDonough's stating anything of his  
5 future plans to Snelling, relative to San Bernardino or  
6 anywhere else.

7 On page two of Snelling's termination  
8 letter of July 21, 1967 (I R 28) Snelling reiterated its  
9 demands that the default provisions of the license agree-  
10 ment be complied with. If done, this would have effectively  
11 removed McDonough from the employment agency business in  
12 Riverside. His response did nothing to deceive or mislead  
13 Snelling in any way. The first proviso of his settlement  
14 offer (I R 61) was that "the license agreement be  
15 considered terminated or rescinded and each party will  
16 release the other from any and all claims arising there-  
17 from." Even if McDonough planned to open a new personnel  
18 agency franchising business in Radnor, Pennsylvania, such  
19 intention would hardly be germane to the settlement offer  
20 if that initial proviso had been agreed upon. Further,  
21 as the sixth condition of the proposed settlement (I R 62),  
22 McDonough disclaimed any intention of reserving Riverside  
23 as his sole domain under the Snelling system, and pro-  
24 posed that Snelling would be free to sell its franchise  
25 to any new purchaser whatever. Under these circumstances,  
26 there was no conceivable duty on McDonough's part to



1 bring his San Bernardino plans to the attention of  
2 Snelling.

3 8. Snelling seeks support for its claims  
4 of irreparable injury by the court's taking judicial  
5 notice of the fact that other Snelling franchisees were  
6 present throughout the protracted hearings (Resp. Br. 15).  
7 Appellants have no quarrel with the court taking judicial  
8 notice of those matters which it has the capacity to so  
9 notice. The transcript reference given by Snelling for  
10 the above statement, however, refers only to certain  
11 unidentified persons who appeared at the first hearing on  
12 September 27, 1967. How the court could divine the  
13 identity of the spectators in the courtroom, let alone  
14 take judicial notice that they were other Snelling  
15 franchisees (with the exception of Mr. La Perch who  
16 testified and identified himself as such) is beyond under-  
17 standing. The fact is that except for the VanTilbergs  
18 (the Snelling San Bernardino franchisee) there was no  
19 other franchisee present in the courtroom at any time,  
20 or representatives of such franchisees, except those who  
21 were named as defendants in the law suit. That portion of  
22 Finding of Fact 28 (I R 131:5-10) is without evidentiary  
23 support.

24 9. Again, on the threat of irreparable  
25 injury, Snelling seeks support in McDonough's discussion  
26 of the San Bernardino situation with other Snelling





1 franchisees at a meeting of the National Employment  
2 Association (Resp. Br. 16). This discussion occurred  
3 after the court had issued its order granting the prelimi-  
4 nary injunction and could hardly have been considered  
5 by the court in arriving at that decision. Furthermore,  
6 teh San Bernardino situation had not been "well advertised  
7 throughout the system" as stated by Snelling inasmuch as  
8 the evidence was that none of the franchisees McDonough  
9 talked to were even aware of an injunction being sought  
10 against his franchise (II R 271:2-4; 11-14).

11 II MISCONCEIVED ARGUMENT IN RESPONDENT'S  
12 BRIEF

13 A. Restrictive Covenants, Public Policy  
14 and Conflicts

15 The Ury Decision

16 Snelling argues (Resp. Br. 35) that  
17 "few bodies of law have changed more rapidly then 'conflicts  
18 during the years since 1924" and asserts a belief that  
19 the Ury v. Jewelers Acceptance Corp. (1964) 227 Cal App  
20 2nd 11, decision exemplifies a change in the "conflicts"  
21 rules pertinaing to contractual choice of law versus forum  
22 public policy. Sneling demonstrates a slavish attachment  
23 to Ury (I R 69, 71-74, 135-136, Resp Br. 20, 22, 26-30, 35)  
24 which permits it to overlook completely the true thrust  
25 of the decision. Ury is a usury case. Conflicts questions  
26 in usury cases were traditionally decided on the classical  
factor of place of contracting, place of performance





1 (Terry Trading Corp v. Barsky (1930) 210 Cal 428, 433-434;  
2 Kraemer v. Coward (1934) 2 Cal App 2nd 506, 508-511;).

3 Indeed, the Ury court itself based its decision in large  
4 measure on these same factors (pp. 16-18, Headnotes 1, 2,  
5 3, and 6). Neither Terry nor Kraemer even mentioned  
6 public policy in the determination of the conflicts  
7 issue there. And Ury does not downgrade forum public  
8 policy as a determining consideration in the conflicts  
9 cases. Ury says:

10 "The law of conflicts, however,  
11 is in a condition that is by no  
12 means static. Strong public policy  
13 of the forum, which always has been  
14 a consideration, is surely no less  
15 regarded now." (p. 20 - emphasis  
16 supplied)

17 Snelling's claims for Ury will not withstand critical  
18 examination.

19 There has been no change in the concept  
20 that the forum can and must disregard the choice of law  
21 of the parties in those instances where the law so chosen  
22 flies directly in the face of settled forum public policy.  
23 In Appellants' Opening Brief (pages 17-27) a host of  
24 judicial decisions in California and elsewhere are discussed  
25 which propound the points (1) that in California as in  
26 other jurisdictions, the public policy against restrictive



1 covenants is settled; (2) that in such jurisdictions,  
2 contracts in violation of the settled public policy  
3 are invalid; and (3) that settled public policy in a  
4 jurisdiction is a dominating factor in the conflicts of  
5 law field sufficient to warrant a disregard of the choice  
6 of law of the contracting parties. Snelling has been  
7 unwilling or unable, or at least disinclined, to devote  
8 even a single line in its brief, to rebut, disparage or  
9 distinguish, in any fashion, the rules these cases stand  
10 for, with the exception of the dust-catching appellation  
11 given this court's decisions in Davis v. Jointless Fire  
12 Brick Co. (1924) 300 F. 1 Resp Br. 35). McDonough has  
13 cited decisions in 1948, 1954, and two in 1965 which  
14 cited Davis with approval (App. Op. Br. 24-25). This  
15 certainly should have vacuumed up a bit of the four  
16 decades of dust Snelling observed in its inspection of  
17 the decision. Snelling looks, but it will not see.

18 The Business and Professions Code  
19 Sections

20 Instead, Snelling represents that Section  
21 16600 of California's Business and Professions Code "is  
22 honeycombed with judicially created exceptions" (Resp.  
23 Br. 31). While \$1,500,000.00 per year in overrides is  
24 a strong motivation to keep a franchise system intact,  
25 it will not justify such a sweeping generalization.

26 It is first noted that the legislature

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1 itself provided the only exceptions (Sections 16601 and  
2 16602) to the basic prohibitory statutory provision  
3 (Section 16600).

4 Secondly, in the decisions referred to  
5 by Snelling, the courts did not honeycomb Section 16600  
6 with exceptions but merely declared, in answer to conten-  
7 tions of parties before them that certain agreements had  
8 the effect of restraining them from "engaging in a lawful  
9 profession, trade, or business" that they did not really  
10 do so. For example, in Gordon v. Landau (1958) 47 Cal  
11 2nd, 690, at page 694, the Court states:

12 "It clearly appears from the terms  
13 of the contract that it did not prevent  
14 defendant from carrying on a weekly  
15 credit business or any other business."  
16 (Emphasis supplied)

17 Again, in Great Western Distillery Products v. John A.  
18 Wathen Distillery Co. (1938) 10 Cal 2nd 442, at page 446  
19 the Court explains:

20 "... Both the purpose and effect of  
21 the contract are not to restrict  
22 the sale of the defendant's receipts,  
23 but to create an instrumentality by  
24 which the receipts will be exploited  
25 and sold. The contract does not  
26 restrain anyone from exercising a





1 trade or business of any kind  
2 within the purview of Section 1673  
3 of the Civil Code." (Emphasis  
4 Supplied)

5 Blank v. Palo Alto - Stanford Hospital Center (1965) 234  
6 Cal App 2nd 377, involved a question of whether a hospital  
7 could properly enter into an exclusive contract for the  
8 operation of its x-ray diagnostic facility, the provision  
9 for which was required by the California Administrative  
10 Code. The opinion deals not with Sections 16600 et seq.  
11 At pages 388-389 of the opinion, the court explained  
12 in substantial detail why the method selected was a  
13 proper exercise of discretion. Appellant there was not a  
14 party to the contract in question and could freely practice  
15 his profession, in all its aspects, at any place other  
16 than the defendant hospital. As stated, the basis for  
17 the decision was far removed from any consideration of  
18 the statutory language of the provisions of the Business  
19 and Professions Code involved in this case.

20 Boughton v. Socony Mobil Oil Co. (1965)  
21 231 CA 2nd 188 involved the construction of a condition  
22 subsequent in a deed of real property:

23 "The single restriction is imposed,  
24 not personally on plaintiffs restrain-  
25 ing them from engaging or carrying on  
26 any profession, trade or business but,





1 on the use of the land upon which  
2 they as grantees are barred merely  
3 from selling petroleum products and  
4 then only for a limited period of  
5 time." (Page 190)

6 "While the cases are uniform in  
7 refusing to enforce a contract  
8 wherein one is restrained from pur-  
9 suing an entire business, trade or  
10 profession, as falling within the  
11 ambit of Section 16600 (citations),  
12 where one is barred from pursuing only  
13 a small or limited part of a business,  
14 trade, or profession, the contract  
15 has been upheld as valid." (Page 192)

16 King v. Gerold (1952) 109 CA 2nd 316 dealt  
17 with an agreement which Snelling characterizes (Resp. Br.  
18 34) as one which restrained trade and did not come within  
19 the exceptions enumerated in Sections 16601 and Section  
20 16602. Of course, not every contract which restrains  
21 trade in the slightest degree is prohibited by Section  
22 16600. As the statute makes plain, it is only those  
23 contracts by which one is "restrained from engaging in a  
24 lawful profession, trade or business of any kind" which  
25 are unlawful. In the King case the court notes this  
26 distinction:



1 "Appellant is not (by the agree-  
2 ment) prohibited from carrying on  
3 his lawful business of manufacturing  
4 trailers but is barred merely from  
5 manufacturing and selling trailers  
6 of the particular design and style  
7 invented by respondent" (Emphasis  
8 Supplied)

9 The final judicial honeycomb found by  
10 Snelling is Bay Area Painters and Decorators Joint  
11 Committee v. Orak (1951) 102 Cal App 2nd 81. Sections  
12 16600-16602 do not appear in the opinion. Appellants  
13 submit that none of these cases constitute a "judicially  
14 created exception" to Section 16600 of the Business and  
15 Professions Code. Two of the decisions do not discuss  
16 the statutory provision at all. The other four simply  
17 find that four contracts that impose an extremely slight  
18 restraint upon the complaining party did not prevent  
19 him from engaging in whatever business, trade or profession  
20 he chose. Contrast such provisions with the restraints  
21 in the Snelling franchise:

22 "Licensees shall not thereafter engage  
23 ... in a similar business to that  
24 licensed and established hereunder  
25 ..." (Paragraph 8(b) - I R 22)  
26



1 "Licensee may be enjoined from any  
2 continued operation of Licensee's  
3 business ..." (Paragraph 11(g) -  
4 I R 21)

5 Two additional incomprehensible proposi-  
6 tions advanced by Snelling are those (Resp. Br. 36) sug-  
7 gesting that the default provision of the franchise  
8 agreement contemplates a transfer of goodwill bringing  
9 the covenant within the exception of Section 16601, and  
10 its conclusion that "here, the entire business has been  
11 created by the franchisor and is operated by the franchisee  
12 in partnership with the national organization".

13 The thought behind the exceptions afforded  
14 by Section 16601 is rather obviously that one should not  
15 be allowed to sell for a valuable consideration the good-  
16 will of his business (whether through a sale of the  
17 business itself, a sale of corporate shares, or sale by  
18 the corporation) and then act in direct derogation of the  
19 sale made and continue to utilize the goodwill asset for  
20 himself.

21 To equate the circumstances contemplated  
22 by Section 16601 with the imperious demand of the franchisor  
23 here is an impressive deductive feat but one devoid of the  
24 usual reasoning process that goes with deduction. Section  
25 16601 deals with one who sells goodwill. The proposed  
26 acquisition of the goodwill of appellants' business by



1 the default process is as far removed from any normal  
2 concept of a free bargain and sale of goodwill as any  
3 transaction that can be imagined.

4 Similarly, for Snelling to claim that the  
5 entire business has been created by and that it has  
6 operated in partnership with its franchisee is to disregard  
7 whose business assets are under discussion. The goodwill  
8 of the Riverside franchise was created by McDonough. The  
9 Snelling name was nothing when he came to Riverside and  
10 every asset of the franchise office in Riverside has been  
11 produced by the time, energy and capital of Robert E.  
12 and Elsa McDonough, and their employees.

13 Paragraph 9 of the license agreement  
14 (I R 21) promptly derails Snelling's inference that it  
15 was in a partnership with its franchisee which, being  
16 dissolved the default brings the transaction within the  
17 exception of Section 16602. It states in part:

18 "Snelling shall not be liable for  
19 any such expenses, taxes, levies or  
20 disbursements otherwise paid or  
21 incurred in connection with the  
22 establishment and maintenance of the  
23 aforesaid business, and licensee agrees  
24 to indemnify and hold Snelling harmless  
25 from any and all claims, suits,  
26 demands or other causes of action,







1 including reasonable attorneys fees  
2 and expenses in defending the same,  
3 which may arise or be asserted  
4 against Snelling by reason of the  
5 operation of licensee's business  
6 or by reason of licensee's use of  
7 Snelling's name. In granting this  
8 license Snelling does not authorize  
9 or empower licensee ... to hold  
10 himself out as a general or special  
11 agent, officer, director, or partner  
12 of Snelling."

13 B. Unconscionability of the Contract

14 Snelling seeks to avoid the evaluation of  
15 the unconscionable nature of its contract by stating that  
16 the question was never presented to the District Court  
17 (Resp. Br. 58). While not dwelt on at length, Appellants'  
18 points and authorities in support of their Motion for  
19 Supersedeas and to Suspend the Injunction Pending Appeal  
20 contained the point of law that:

21 "Equity does not enforce un-  
22 conscionable bargains and specific  
23 and injunctive relief will be denied  
24 on that ground alone." (I R 100:  
25 29-31)

26 The very same decision of the Court of Appeals



1 for the Third Circuit of Campbell Soup Co. v. Wentz  
2 (1948) 172 F 2nd 80, discussed at pages 52 and 58 of  
3 Appellants' Opening Brief, was cited as authority for  
4 that point of law in the District Court.

5 In its effort to ameliorate the burdensome  
6 provisions of its license and franchise agreement as  
7 discussed by McDonough (App. Op. Br. 53-58), Snelling  
8 relies on suggestions that the criticized contractual  
9 provisions have not in fact been troublesome to appellants  
10 or other franchisees, that Snelling has not exercised its  
11 right under the agreement in some particulars, and that  
12 in the performance of the contracts, strict adherence  
13 to the provisions has not always been required by Snelling  
14 (Resp. Br. 58-60). This begs the question posed by  
15 Campbell supra, where the court withheld the aid of  
16 equity on the basis of the content of the agreement itself,  
17 without regard to the performances under it by the  
18 contracting parties, in this language:

19 "We think it is too hard a bargain  
20 and too one-sided an agreement to  
21 entitle plaintiff to relief in a  
22 court of conscience."

23 c. Trade Secrets

24 In a recent pleading case, testing the  
25 sufficiency of a complaint against a demurrer, Justice  
26 Hufstedler, of California's District Court of Appeal for



1 the Second District, (Diodes, Inc. v. Franzen (1968)  
2 260 ACA 241) held that in order to plead adequately a  
3 cause of action for protection against the use or dis-  
4 closure of a trade secret, one must plead facts showing  
5 (1) the existence of subject matter which is capable of  
6 protection as a trade secret; (2) that the secret was  
7 disclosed to the defendant under circumstances giving  
8 rise to a contractual or other legally imposed obligation  
9 on the part of the discloser not to use or disclose the  
10 secret to the detriment of the discloser; and (3) if the  
11 defendant is an employee or former employee of the  
12 plaintiff the facts alleged must also show that the  
13 public policy in favor of the protection of the complainant's  
14 interest in maintaining the secret outweighs the interest  
15 of the employee in using his knowledge to support himself  
16 in other employment. (Page 247) Presumably, these  
17 same elements would have to be proven in order to establish  
18 a prima facie case for the protection of trade secrets.  
19 The appellate court affirmed the trial court's dismissal  
20 of the action essentially upon the basis that plaintiff  
21 failed "to plead facts showing that it ever had any  
22 trade secret to protect", and that the complainant should  
23 "describe the subject matter of the trade secret with  
24 sufficient particularity to separate it from matters of  
25 general knowledge in the trade or of special knowledge  
26 of those persons who are skilled in the trade, and to





1 permit the defendant to ascertain at least the boundaries  
2 within which the secret lies." (Page 250)

3 Appellant faces the same dilemma Justice  
4 Hufstedler encountered in evaluating the complaint in  
5 Diodes. After four days of hearings before the District  
6 Court, after studying the 63 pages of Respondent's Brief,  
7 after comparing the Snelling manual to the others in-  
8 troduced in evidence herein, he is yet unaware of any  
9 aspect of the Snelling system which is novel, of unique  
10 value, or secret. That its training is helpful, is not  
11 denied. That its manuals are useful, as are the others  
12 reviewed, is conceded. But he has been led to no process,  
13 no method, surely no device or machine, nor any unique  
14 or novel business idea or concept in which Snelling has  
15 or could have acquired a property interest under the  
16 trade secret doctrine.

17 In this respect, Snelling's reliance on  
18 Ernst and Ernst v. Carlsen (1966) 247 Cal App 2nd 125  
19 (Resp. Br. 49) seems misplaced. There the proceedings  
20 were to enjoin Carlsen "from unfairly interfering with  
21 the advantageous business relations of Respondents and  
22 their customers." (Page 127) This involved no aspect  
23 of competition between respondents, a nationwide accounting  
24 firm, and Carlsen, a former employee. Rather, Carlsen  
25 sought to disrupt the advantageous business relationship  
26 between the accounting firm and one of its clients,





1     contending the firm had improperly given capital gains  
2     treatment to certain transactions rather than ordinary  
3     income. The injunction merely silenced the employee and  
4     prevented a continuation of his efforts to cause a breach  
5     between the accounting firm and the client. While  
6     Carlsen continued to work in the area, and solicited this  
7     particular client, among others whose files he had handled  
8     while working for his former employer, this aspect of  
9     his conduct was not involved in the case on appeal. The  
10    extensive quotation from the decision, (Resp. Br. 50)  
11    appears to be simply another manifestation of Snelling's  
12    predilection toward citation of case authority where  
13    no factual similarity exists.

#### 14                   CONCLUSION

15               The facts in this case show the value  
16    of the doctrine of stare decisis. McDonough's counsel's  
17    letters to Snelling show his reliance upon the state of  
18    the law as it existed under Davis v. Jointless Fire Brick  
19    Co. (1924) 300 F. 1 and Sections 16600-16602 of California's  
20    Business and professions Code.

21               The very purpose of the doctrine is to  
22    enable business and professional men to plan and govern  
23    their affairs under a discernible rule of law.

24               The dangers of tampering with the doctrine  
25    have been most expressively demonstrated in the calamitous  
26    events which have befallen Appellant to this point in



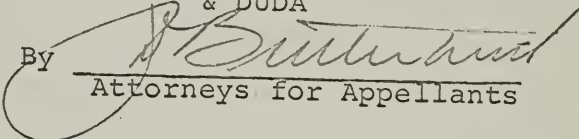
1 the case.

2 This Court's reversal of the order of the  
3 District Court would restore a measure of permanence and  
4 order to an admittedly complex socio-economic problem.

5 Respectfully submitted,

6  
7 HENNIGAN, BUTTERWICK, HANING  
8 & DUDA

9 By

  
Attorneys for Appellants



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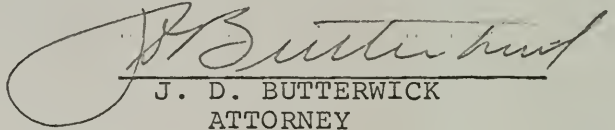
ERRATA IN APPELLANTS OPENING BRIEF

- Page 8, Line 26: Change Reporters' Transcript  
Reference to: "(255-256)"
- Page 15, Line 20: Between the words "to" and "the"  
insert the following: "in. They  
would be more appropriately  
addressed to"
- Page 50, Line 16: At end of line, insert the fol-  
lowing: "(R 115/20-25; 116/10-16;  
117/19-25; 120/2-15)"
- Page 62, Line 15: Change "4" to "Y"



1 CERTIFICATE

2 I certify that, in connection with the  
3 preparation of this brief, I have examined Rules 18,  
4 19, and 39 of the United States Court of Appeals for  
5 the Ninth Circuit, and that, in my opinion, the fore-  
6 going brief is in full compliance with those rules.

7   
8 J. D. BUTTERWICK  
9 ATTORNEY

10  
11 CERTIFICATE OF SERVICE BY MAIL

12 I, J. D. BUTTERWICK, certify that I am the  
13 attorney for appellants in this action, and that I  
14 served three copies of the above Appellants' Reply  
15 Brief by mail on the attorney for appellee.

16 DATED: August 1, 1968.

17   
18 J. D. BUTTERWICK  
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